IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel. W. A. DREW EDMONDSON, in his capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA and OKLAHOMA SECRETARY OF THE ENVIRONMENT C. MILES TOLBERT, in his capacity as the TRUSTEE FOR NATURAL RESOURCES FOR THE STATE OF OKLAHOMA,	)	
Plaintiff,	)	
vs.	)	**05-CV-0329 GKF-SAJ**
TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC., COBB-VANTRESS, INC., AVIAGEN, INC., CAL-MAINE FOODS, INC., CAL-MAINE FARMS, INC., CARGILL, INC., CARGILL TURKEY PRODUCTION, LLC, GEORGE'S, INC., GEORGE'S FARMS, INC., PETERSON FARMS, INC., SIMMONS FOODS, INC., and WILLOW BROOK FOODS, INC.,	)	
Defendants.	)	

DEFENDANT, PETERSON FARMS, INC'S RESPONSE TO STATE OF OKLAHOMA'S MOTION TO COMPEL PETERSON FARMS TO PRODUCE A PROPERLY PREPARED 30(b)(6) DESIGNEE FOR DEPOSITION AND TO ALLOW FULL QUESTIONING OF THAT DESIGNEE

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Defendant, Peterson Farms, Inc. ("Peterson") hereby responds to Plaintiffs' Motion to Compel with regard to Peterson's 30(b)(6) testimony, (Dkt. No. 1250), and asserts that Plaintiffs' Motion should be denied in its entirety. Further, as discussed in Section III(B) below, Plaintiffs made no effort to confer with Peterson on many aspects of their Motion, and therefore, Plaintiffs Motion was improvidently filed in violation of Fed. R. Civ. P. 37(a)(5)(i) and N.D.LCvR 37.1.

INTRODUCTION

Plaintiffs' characterization of their Notice, the nature of their inquiry, the testimony of Peterson's representative and the misconduct by their own counsel, which prompted objections and instructions from Peterson's counsel is tainted and unsupported by the record. There are a number of important considerations, which Plaintiffs have failed to bring to the Court's attention.

First, Plaintiffs served Peterson with a Notice for 30(b)(6) deposition listing thirty-six Topics of inquiry. (Dkt. No. 1250 Ex. 1.) What Plaintiffs fail to share with the Court is that Peterson's counsel advised them in writing prior to the deposition that information responsive to certain of the areas of inquiry simply was not known to or reasonably attainable by Peterson. (Corr. from S. McDaniel to R. Garren, dated July 18, 2007, attached hereto as Ex. "A" hereinafter "Objections".) These statements were entirely consistent with Peterson's responses to Plaintiffs' written discovery, which sought the very same information.[1] Peterson's counsel invited a dialogue with Plaintiffs' counsel to discuss these issues, as well as the numerous objectionable aspects of the Notice, yet Plaintiffs ignored the invitation, and now feign disdain that they did not receive the information they believe they were entitled to.

Second, as is the case in their Motion, Plaintiffs' counsel refused to abide by the express terms of their Notice during most, if not all of the challenged testimony. In their Motion, Plaintiffs insist that they are entitled to binding testimony from Peterson on legal interpretations of terminology in the Oklahoma Statutes, as well as broad, highly technical matters suitable only for a witness qualified pursuant to Fed. R. Evid. 702. As

[1] Note that Plaintiffs have not come before this Court seeking to compel further responses to any of this discovery.

it played out in the deposition, this was not a situation where a party was deposing a corporate designee on the designated topics, and then sought to expand the event into a fact deposition. At the deposition, and as made abundantly clear in Plaintiffs' Motion, they were, and are, insisting that Peterson's representative speak for the corporation on topics clearly outside of those included in the Notice. This type of behavior and abuse, the law will not abide.

On many instances, Peterson's counsel asked Plaintiffs' counsel, to no avail, to identify the noticed Topic that would support Peterson's obligation to offer binding testimony on some far a field subject he was pursuing, and asked Plaintiffs' counsel to refrain from seeking corporate testimony on subjects for which Plaintiffs failed to provide Peterson adequate notice to properly prepare a corporate witness. Only when Plaintiffs' counsel continued in his disregard of his own Notice and counsel's admonitions, and proceeded to harass and embarrass the witness (who was neither a lawyer, nor a scientist) did Peterson's counsel intercede to protect his client.

Finally, Plaintiffs misrepresent that Peterson failed to produce a knowledgeable designee to address their Topic Nos. 3 through 34. (Dkt. No. 1250 at 1.) What they fail to tell the Court is that Peterson produced three designees to cover the Topics in the Notice. Peterson's counsel provided Plaintiffs' counsel a table identifying the three witnesses and the Topics upon which they would testify. (Memo from S. McDaniel to R. Garren, dated July 26, 2007, attached hereto as Ex. "B", and appended to Mr. Houtchins deposition as Ex. "1A".) As the list details, Janet Wilkerson was designated to address Topic Nos. 24, 26, 27, 28, 29, 30, 32 and 33 on behalf of Peterson. Plaintiffs also fail to advise the Court that because they wasted so much of the day trying to examine Mr.

Houtchins on the law, obscure studies, reports and on scientific theories, they did not save time to get to Ms. Wilkerson's testimony. Thus, Plaintiffs have falsely accused Peterson of failing to produce a witness to address eight Topics, knowing that the witness was in the room and ready to testify, and that they failed to reserve time to ask her a single question.

Plaintiffs' conduct at the deposition violated Fed. R. Civ. 30(b)(6), and rose to the level of impropriety and abuse. They are not entitled to an order compelling Peterson to produce a witness to testify further, and Peterson stands by its decision to refuse to give binding testimony on any subject that was not included within the four corners of Plaintiffs' Notice; however, it acknowledges that under the exigencies of the deposition, the preferred course under the Rules would have been to suspend the deposition and pursue a protective order from the Court pursuant to Fed. R. Civ. P. 30(d)(3). Concurrently with its Response to Plaintiffs' Motion, Peterson filed its Motion for Protective Order requesting the Court to direct that any further examination of Peterson on the Topics contained within the Notice not be had.

ARGUMENT AND AUTHORITIES

I. PETERSON FULFILLED ITS OBLIGATIONS WITH REGARD TO TOPICS INCLUDED IN PLAINTIFFS' NOTICE

Of the complaints raised by Plaintiffs in their Motion, only a limited number derive from questions posed by Plaintiffs' counsel that actually fell within a Topic provided in Plaintiffs' Notice. In each case, Peterson's designee gave full and complete answers reflecting the information that was "known to or reasonably available to" Peterson as required under Fed. R. Civ. P. 30(b)(6). As set forth in the Objections

provided by Peterson's counsel to Plaintiffs,[2] Peterson did not have a system in place to track the growers who contract with it by watershed until 2002. (Ex. "A" hereto.) Mr. Houtchins confirmed this fact in his deposition. (Dkt. No. 1250, Ex. "2" at p.12:2-11; p. 32:13-25.) The practical result is that prior to that time, Peterson had no reasonably available means of tracking operations on a watershed-by-watershed basis. Likewise, even though Peterson now keeps track of the watersheds where its contact growers operate, it does not maintain records of birds produced, mortality, feed delivered, or any other operational parameter on a per watershed basis. As discussed in regard to the specific Topics below, Peterson provided Plaintiffs with the information it possesses within the normal operational reports it maintains.

Plaintiffs appear to argue that Peterson should be compelled to perform a mathematical summary of the information produced to Plaintiffs in its growers' files in order to produce evidence for this lawsuit in the form Plaintiffs prefer. Notably, they have not cited any legal authority to support their right to impose such a burden on Peterson. As the federal courts have recognized, the "reasonably available" limitation on corporate knowledge set forth in Fed. R. Civ. P. 30(b)(6) reflects that courts should apply "a rule of reason." *Banks v. Office of the Senate Sergeant-At-Arms*, 241 F.R.D. 370, 373 (D. D.C. 2007); *Wilson v. Lakner, M.D.*, 228 F.R.D. 524, 528 n. 7 (D. Md. 2005) (stating that "[o]bviously a rule of reason applies. There is no obligation to produce witnesses who knows every single fact, only those that are relevant and material to the incident or

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[2] Serving Plaintiffs' counsel with its objections to the definitions and areas of inquiry in the Notice was procedurally correct, and the Court should consider these pre-deposition objections when analyzing Plaintiffs' Motion to Compel and Peterson's Motion for Protective Order. *See Sprint Communications v. Vonage Holdings Corp.*, 2007 WL 2333356 at *2 (D. Kan. Aug. 15, 2007).

incidents that underlie the suit"). Similarly, the duty of a corporation to marshal information for a 30(b)(6) deposition is the same as that expected in answering interrogatories. *Wilson*, 228 F.R.D. at 528-29.

Hence, by referring Plaintiffs to the records already produced where they could find the information they sought, Mr. Houtchins fulfilled his duty. The critical question is whether Peterson engaged in the type of "bandying" that Rule 30(b)(6) was designed to eliminate. *See* Advisory Committee Comments to 1970 Amendments to Fed. R. Civ. P. 30; *Banks*, 241 F.R.D. at 373. As the following discussion establishes, Peterson did not "bandy" in response to Plaintiffs' inquiries that were within the scope of their Topics, but rather, Peterson completely satisfied its 30(b)(6) obligations.

A. Topic 6: Number, size and location of poultry houses/barns, past and present, at your poultry growing operations in the IRW; and
Topic 7: Number of and kind of birds raised in the IRW each year by you or poultry growers under contract with you.

Plaintiffs are incorrect in asserting that Mr. Houtchins neither answered the questions, nor was prepared to answer the questions on these Topics. Plaintiffs failed to advise the Court that Mr. Houtchins produced at the deposition a printout of all current Peterson contract growers in the IRW, which showed for each grower, the farm locations, the type of birds produced, and the square footage of their houses. (Marked as Ex. "1B" to the deposition, Dkt. 1250, Ex. "2" at pp. 35:22 – 36:10.) He testified that Peterson contracts with the operators of 10 breeder and 153 broiler houses in the IRW. (Dkt. No. 1250, Ex. "2" at pp. 12:23; 13:15-16.) He testified that Peterson considers breeder capacity to be 8,000 birds per house; however, Peterson cannot accurately assess broiler production per year/ per house due to the "out time" and the variances in the numbers of

chicks placed. (*Id.* at pp. 13:22 – 14:3.) Peterson obviously knows how many birds it slaughters each year, but these are gross numbers from its single processing plant, not production figures broken down by watershed. When asked, Mr. Houtchins testified that over the years, the production of chickens by contract growers for Peterson in the IRW "has increased a little bit." (*Id.* at p. 26:6-9.)

As Mr. Houtchins explained to Plaintiffs' counsel, Peterson does not have any reports that reflect the annual bird production or mortality for individual farmers as the Topic requested. He stated that the only means for anyone to accurately determine the number of birds produced from each poultry farm in the IRW would be to pull the records for each individual grower and add them up. (*Id.* at pp. 14:16 – 16:14; 19:1-18; 36:22 – 37:6; 40:14 – 41:16).[3] Peterson's position in its pre-deposition Objections, its written discovery responses and in the deposition is that it does not maintain the type of IRW summary data Plaintiffs desire; however, it has produced to Plaintiffs the grower records from which this data could be discerned. In essence, Plaintiffs are insisting that Peterson create data that it does not maintain in the ordinary course of its business. This is a burden Plaintiffs cannot impose upon Peterson solely through the mechanism of a 30(b)(6) deposition notice.

[3] Plaintiffs' Motion also fails to address the objection Peterson raised to the lack of any temporal limitation on the scope of its Notice. (Dkt. 1250, Ex. "1" at 1; Ex. "A" hereto.) The parties raised this matter before the Court in a prior hearing, and as the Court noted, Plaintiffs have failed to make any showing to establish the relevance of past operations on any current alleged injury. (Order dated July 6, 2007, Dkt. 1207 at p. 2.) Accordingly, Peterson has produced its growers' records for the IRW extending back to 2002 from which Plaintiffs can discern the information they seek. Plaintiffs and Peterson are currently discussing potential alternatives for producing selected records further back in time.

B. Topic 11: The amount of poultry waste generated by each and all of your poultry growing operations within the IRW on an annual basis.

Plaintiffs' representation in its Motion that Mr. Houtchins was "unprepared and/or not permitted to testify" about this Topic is plainly incorrect. As is discussed in greater detail in Section II of Peterson's Response, the portions of Mr. Houtchins' deposition cited by Plaintiffs in their Motion have nothing to do with the referenced Topic, *i.e.*, the amount of "poultry waste." (Dkt. No. 1250 at 5-6.) Plaintiffs' complaining derives solely from their improper attempts to have Peterson give binding testimony about the legal interpretation of the term "poultry waste" in the Oklahoma Registered Poultry Feeding Operations Act in order to set up a conflict between the corporation's testimony and the legal objections raised by its counsel to the Plaintiffs' manner of using the term. Curiously, Plaintiffs do not direct the Court to the portions of the deposition where Topic 11 was raised.

It wasn't until much later in the deposition when Plaintiffs finally asked the questions actually covered by Topic 11. When asked by Plaintiffs if Peterson knows how much "poultry waste" was land applied in the IRW last year, or how much poultry litter was land spread in the IRW from Peterson's contract growers' houses, Mr. Houtchins clearly stated that it does not. (Dkt. 1250, Ex. 2 at p. 112:10-17.) As Mr. Houtchins explained, the poultry growers own the litter in their houses, and Peterson does not have any way to track its disposition. (*Id.* at pp. 144:17 – 145:8.) And, when Plaintiffs' counsel re-asked the questions near the end of the deposition, Mr. Houtchins testified that in Peterson's view, the only reliable method to determine the amount of poultry litter

generated in the IRW would be to weigh the litter as it came out of the houses, and analyze it for its nutrient content. (*Id.* at pp. 163:25 – 164:14.)

As Mr. Houtchins explained many times in his testimony, these independent contract growers manage their litter in accordance with their government-issued Nutrient Management Plans. (Dkt. 1250, Ex. "2" at pp. 44:19 – 45:13; 96:24 – 97:9; 102:5-24; 116:7-10.) The disposition of the litter is a matter between the growers, the third-party independent litter brokers and spreaders, and the respective states in which they operate. This information is neither given to nor known by Peterson. Accordingly, if Plaintiffs believe this information is relevant to their claims, they will need to determine it on their own. They cannot, by virtue of their discovery devices, expect Peterson to collect data it does not possess simply to save them the effort.

These excerpts clearly show that when Plaintiffs asked the questions covered by Topic 11, Peterson's representative gave complete answers and explained why Peterson could not provide a numerical answer to the information sought – Rule 30(b)(6) does not require more.

C. Topic Nos. 12, 14, 15, 16, 17, 18, 20 and 22

Plaintiffs make the unfounded statement in their Motion that Peterson failed to produce a witness to provide testimony on these eight topics, but as is painfully evident, they have not directed the Court to a single portion of Mr. Houtchins' deposition where they asked the questions covered by the Topics and failed to receive a complete response. Again, Plaintiffs direct the Court to portions of the deposition where Plaintiffs' counsel was pressing Mr. Houtchins to give binding testimony on broad, hypothetical, and highly technical matters, which Peterson is not required to give. Plaintiffs' Motion on this point

typifies the difficulties encountered in Peterson's corporate deposition. Plaintiffs' counsel either did not understand, or knowingly disregarded the express Topics set forth in his own Notice.

Plaintiffs were obliged to set forth in their 30(b)(6) Notice "with reasonable particularity the matters for examination." Fed. R. Civ. P. 30(b)(6). The express language they chose to define their Topics bound Plaintiffs, and thus, defined the limits of Peterson's duty to prepare a knowledgeable witness. *See Banks v. Office of the Senate Sergeant-At-Arms*, 241 F.R.D. 370, 375 (D. D.C. 2007) (holding that the responding entity was entitled to rely on the terminology set forth in the notice); *Payless Shoesource Worldwide, Inc. v. Target Corporation*, 2007 WL 1959194 at *1, *3-4 (D. Kan. June 29, 2007) (denying deposing party's motion to compel based upon the literal scope defined by the notice).

If the Court reviews these eight Topics set forth in full in the Notice, (Dkt. No. 1250, Ex. "1."), it will see that these Topics solicit testimony on factual subjects, not scientific theories or hypothetical concepts. The operative word Plaintiffs drafted into each of these Topics, but which they ignored in the deposition and their Motion is -- "the." The effect of Plaintiffs' use of this term meant that Peterson was to produce a witness to testify about its knowledge of actual practices or events that have occurred, as distinguished from broad, nebulous hypotheses or opinions that some scientist may have rendered in the abstract. Plaintiffs' Topics ask Peterson to testify about what has, is or is not occurring. They do not, nor should they seek for Peterson to offer binding testimony on what conceptually could occur within the complexities of the environment, which is reserved solely for witnesses properly qualified pursuant to Fed. R. Evid. 702 and

designated to testify pursuant to Fed. R. Civ. P. 26(2). The Court can appreciate this point by referring back to the words of Plaintiffs' Notice. Per the Notice, Peterson was obliged to produce a representative to give testimony binding on the corporation regarding:

- Industry and Peterson contract growers' practices for managing litter (Topic 12);
- Knowledge of the run-off… within the IRW (Topic 14);
- Knowledge of the run-off…from locations on which litter has been stored, spread on or disposed of (Topic 15);
- The environmental and human health effects…within the IRW (Topic 16);
- The environmental and human health effects… from locations on which litter has been stored, spread on or disposed of (Topic 17);
- The efforts undertaken by you…to evaluate or quantify any environmental and human health effects…within the IRW (Topic 18);
- Practices, policies…pertaining to management…disposal of litter by your growing operations in the IRW (Topic 20); and
- Best management practices for …disposal of poultry litter generally and in the IRW, and the effectiveness of best management practices in preventing runoff…into the waters of the IRW (Topic 22).

Thus, to the extent Peterson had or could reasonably obtain knowledge of any practice on the contract growers' farms or any occurrence fitting Plaintiffs' descriptions of run-off, releases, impacts, environmental or human health effects from places where the contract growers had stored or applied poultry litter, it was obligated to offer testimony on these Topics. It did just that.

When asked about poultry litter management practices and best management practices, Mr. Houtchins explained that the growers utilize their Nutrient Management Plans, and depending on what the plans provide, some land apply it, some sell it, and

some of it is trucked to other areas. (Dkt. 1250, Ex. "2" at pp. 44:19 – 45:23; 46:5 – 47:9.) He explained Peterson's contract requirement that growers possess or have applied for Nutrient Management Plans, the basis for Nutrient Management Plans and how they have changed over the years, which in turn has affected management practices. (*Id.* at pp. 76:10 – 77:12; 78:13-18; 96:24 – 97:9; 116:7 – 117:4.) He also explained how litter management in the Eucha-Spavinaw Watershed differs from the IRW as a consequence of the *City of Tulsa* resolution. (*Id.* at pp. 100:9 – 104:16.) Mr. Houtchins also testified about clean-out practices and Peterson's position with regard to proper litter storage. (*Id.* at pp. 134:10-19; 135:1 – 137:9.)

When asked about Peterson's knowledge about whether there has been any run-off, releases or deleterious effects from the practice of land applying poultry litter, Mr. Houtchins gave clear testimony that although litter can contain phosphates, when Nutrient Management Plans are followed, no negative effects result, and that to Peterson's knowledge, the practice has not caused any run-off or harm to the IRW. (*Id.* at pp. 91:15-22; 129:14 – 131:5.) This testimony is entirely consistent with Peterson's previous discovery responses and denials set forth in its Answer to Plaintiffs' claims.

When asked what steps Peterson has taken, Mr. Houtchins explained that Peterson's requirement for its growers to follow government-approved Nutrient Management Plans ensures that pollution will not result from the growers' choice to land apply their litter. (*Id.* at pp. 45:3-8; 91:15-22; 96:24 – 97:9) He also explained what actions Peterson can take and has taken if it learns that a grower has violated his/her Nutrient Management Plan. (*Id.* at pp. 117:4-24; 147:12-17.)

Hence, a fair reading of Mr. Houtchins' testimony reveals that when Plaintiffs' counsel set aside his gamesmanship, argumentative lines of questions, and harassing behavior to ask the questions that actually fell within the Topics of Plaintiffs' Notice, he received clear, full and forthright answers interrupted only by counsel's appropriate objections to the form when necessary. Plaintiffs have come forward with not a single circumstance where they inquired of Peterson's representative within the scope of their Notice and failed to receive a proper answer. Accordingly, Peterson respectfully requests the Court reject Plaintiffs' claim that Peterson failed to present a properly prepared witness.

II. PLAINTIFFS ARE NOT ENTITLED TO BINDING TESTIMONY FROM PETERSON ON THE LEGAL INTERPRETATION OF STATUTES OR ON SCIENTIFIC AND TECHNICAL CONCEPTS RESERVED FOR EXPERT WITNESSES

As the foregoing discussion and Mr. Houtchins' testimony reveal, Peterson presented a witness to fully address the Topics covered by Plaintiffs' 30(b)(6) Notice. The bulk of Plaintiffs' Motion is directed to the situations in the deposition where Peterson refused to answer when faced with Plaintiffs' counsel's repeated and improper demands that Peterson give binding testimony on the legal interpretation of Oklahoma's Poultry Act, and on complex scientific theories excerpted from documents that were not drafted by Peterson. The Notice did not require such testimony, and Plaintiffs have offered no legal authority to suggest that they had the right during the deposition to go outside of their Notice to demand such binding testimony from a 30(b)(6) witness. Corporate representative depositions are reserved for inquiries into facts. To the extent Plaintiffs sought to explore Peterson's legal and scientific contentions, the proper method

is through interrogatories. As the district court held in *Wilson v. Lakner, M.D.*, 228 F.R.D. 524 (D. Md. 2005):

> Whereas the *facts* of a relevant incident or incidents are proper for a 30(b)(6) inquiry, the *contentions*, *i.e.*, theories and legal positions, of an organizational party may be more suitably explored by way of interrogatories and the Court may properly order (as the Magistrate Judge did here) that contentions only be inquired into in this fashion.

Id. at 529, n. 8 (original emphasis).

Not once did Plaintiffs' counsel suggest that Mr. Houtchins could step out of his role as a corporate designee to answer these questions beyond the scope of the Notice. Rather, just as they asserted in their Motion, Plaintiffs demanded in the deposition that "Peterson speak" on these subjects. There is no basis in the law to support Plaintiffs' request for an order from this Court compelling Peterson to answer such questions, and as Plaintiffs' counsel's deposition conduct was abusive, it should be condemned.

Plaintiffs' tactics – seeking such binding testimony outside the scope of the Notice – were designed to accomplish two purposes. First, Plaintiffs' counsel sought to elicit testimony from Peterson that would undermine the legal objections Peterson's counsel had set forth to Plaintiffs' use of the term "poultry waste." Second, Plaintiffs' counsel endeavored to ambush Peterson with excerpts from highly technical reports in order to elicit what amounted to expert opinions to bolster its own experts, or to potentially conflict with Peterson's experts, or to manufacture some (albeit unfounded) technical question of fact in the hopes of surviving summary judgment on causation. As played out in the deposition, these tactics proved to be improper and abusive to the witness.

A. Plaintiffs' Examination Seeking Purely Legal Conclusions Was Improper

Plaintiffs complain to the Court about Peterson's refusal to engage in a legal analysis in its 30(b)(6) deposition. (Dkt. 1250 at 5-6.) By asking Peterson's representative to interpret what the Oklahoma Legislature meant when it used the term "poultry waste" in the Oklahoma Poultry Feeding Operations Act, Plaintiffs' counsel was seeking to use Peterson's witness to undermine the legal objection Peterson's counsel had set forth to the manner in which Plaintiffs had used the term in the Notice and the deposition. Peterson's counsel made a record of this objection in his Objections to the Notice, and stated the objection on the record at the deposition. (Ex. "A" hereto; Dkt. 1250, Ex. "2" at p. 42:13-23.)

Rather than respect the objection and legal decision of Peterson's counsel, and Peterson's representative's right to abide by its counsel's legal advice, Plaintiffs' counsel launched forward with a line of questions seeking to force Peterson to interpret the Act. Plaintiffs' counsel's behavior was particularly unfair because he pressed this line of questioning even after learning that Mr. Houtchins had never even seen the language of the Act. (*Id.* at pp. 49:21 – 50:3.) Once this fact was made clear, Peterson's counsel asked Plaintiffs' counsel to identify which Topic of the Notice this line of questioning fell within. Plaintiffs' counsel did not identify any Topic, but his response clarified his intent, to wit: "We're talking about poultry waste and your objections to the term." (*Id.* at p. 50:6-14 [emphasis added].) Counsel's objection to a term is not a proper subject for examining any fact witness, particularly when the objection comes from that witness' own attorney.

Plaintiffs' counsel's decision to pursue this line of questioning despite Peterson's counsel's objections and admonitions was improper, and only served to embarrass the witness and to create tension between lawyer and client. Oklahoma's Rules of Professional Conduct proscribe Plaintiffs' counsel's efforts to embarrass Mr. Houtchins and to interfere with Peterson's rights to abide by its counsel's legal advice and objections. *Id.* Rule 4.4. Given that this line of questioning was improper and did not fall within any Topic set forth in Plaintiffs' Notice, the Court should deny Plaintiffs' request that Peterson provide binding testimony on this subject. *See Sprint Communications Co. v. Vonage Holdings Corp.*, 2007 WL 2333356 at *4 (D. Kan., Aug. 15, 2007)(sustaining Sprint's pre-deposition objections to a topic defined in Vonage 30(b)(6) notice, and denying Vonage's plea for sanctions despite the fact that Sprint's counsel directed his client not to answer questions on the topic at issue).

B. Plaintiffs' Examination on Topics Reserved For Qualified Experts Was Improper

During Mr. Houtchin's deposition, Peterson's counsel objected at least twelve times to Plaintiffs' insistence upon asking the corporation to answer convoluted, highly technical and hypothetical scientific questions that were both outside any Topic in the Notice and only proper for a qualified witness under Fed. R. Evid. 702. (Dkt. 1250 Ex. "2" at pp. 24:25 – 25:5; 59:23 – 62:10; 62:22 – 63:6; 63:20 – 64:8; 64:23 – 66:5; 68:1-17; 70:22 – 72:1; 73:21 – 74:22; 109:20 – 111:7.) What rendered the examination even more abusive was Plaintiffs' counsel's insisting upon pounding away at the witness using selective excerpts from multi-page reports and articles that: (1) were not authored by Peterson; (2) the witness was not familiar with; and (3) two cases were documents that

the Plaintiffs' counsel could not substantiate at the deposition had ever been produced to Peterson in the litigation.[4]

Plaintiffs unabashedly lay out some of these ridiculously complex and compound questions for the Court in their Motion. For instance, Plaintiffs' counsel asked Peterson's lay 30(b)(6) witness if he agreed that:

> [P]otentially contaminated substances become 'available' to the environment. If they also become 'detached' from the site, for example, by being absorbed to sediments or dissolved in water, they can be 'transported' off site. Transport occurs when contaminates in the animal waste (the unused nutrients, bacteria or other elements in the litter) are released to surface drainage or infiltrate beneath the soil surface in groundwater recharge areas.

(Dkt. 1250 at 9.) Having made no attempt to ascertain this witnesses' education or background, Plaintiffs' counsel went even further by asking Mr. Houtchins if he agreed that:

> Animal waste is a potential source of some 150 disease-causing organisms or pathogens. These organisms include bacteria, viruses, fungi, protozoa, and parasites. Examples of undesirable microorganisms include Salmonella, Cryptosporidium, Giardia, Listeria, coliform, New Castle (virus) ringworm, coccidiosis, and Ascaris. When found in water or

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[4] Deposition Exhibit 7, the "Water Quality Handbook," (Dkt. 1250 Ex. "3") was published by the Poultry Water Quality Consortium and contains a compilation of scientific studies and reports. Deposition Exhibit 12 was a 1988 report authored by Martin Maner for the Arkansas Department of Pollution Control & Ecology about nutrients and water quality in Washington and Benton Counties in Arkansas. (Dkt. 1250, Ex. "2" at p. 108:1-6.) Mr. Houtchins testified that he was unfamiliar with the author and had never seen the document. (*Id.* at p. 108:6-12.) The documents did not exhibit a production bates number, and when challenged, Plaintiffs' counsel could not confirm that it had been produced to Peterson prior to the deposition. (*Id.* at p. 114:13 – 115:3.) Deposition Exhibit 16 was an exhibit compiled by Plaintiffs purporting to contain documents from conferences held by the Arkansas Water Resources Center. (*Id.* at p. 125:12-17.) Mr. Houtchins stated that he did not attend the conference, was not aware of anyone at Peterson who attended the conference, is not familiar with the Center and stated that he had never seen the documents. (*Id.* at pp.125:18 – 126:2.) When challenged, Plaintiffs' counsel admitted that he did not know whether or not Plaintiffs had produced the documents comprising the exhibit in the litigation. (*Id.* at p. 129:3-11.)

> wastes, these pathogens pose significant threats to humans and other animals. They can infect humans and animals through drinking water, contact with the skin, or consumption of fish or other aquatic animals. Most pathogens die relatively quickly. However, under the right conditions, they may live long enough to cause problems. They may persist longer in groundwater than in surface water.

(*Id.* at 11.)

As Mr. Houtchins testified, neither he nor anyone at Peterson is trained in soil science or microbiology. (Dkt. 1250 Ex. "2" at p. 75:1-4.) Even if they were, all of the inquires about which Plaintiffs complain fall far outside of any Topic in the 30(b)(6) Notice, and should be reserved for a deposition pursuant to Fed. R. Civ. P. 26(b)(4)(A). Despite this fact, Plaintiffs insisted in the deposition and maintain in their Motion that Peterson must give binding testimony on this subject matter. As the transcript reveals, and as Peterson's counsel noted on the record, this oppressive and harassing examination went on for hours without Plaintiffs' counsel ever asking a question from his list of Topics in the Notice. (*Id.* at pp. 73:3-5; 127:25 – 128:9.)

Plaintiffs' treatment of Mr. Houtchins in this deposition was even more egregious than that condemned by the court in *United States ex rel. Tiesinga v. Dianon Systems, Inc.*, 240 F.R.D. 40 (D. Conn. 2006). That case involved a 30(b)(6) notice propounded to the National Institute of Health. *Id.* at 41. The witness designated to appear was a recognized expert in the field at issue, but she had not been designated by any party as a testifying expert, nor had she been noticed for an individual deposition. *Id.* At the deposition, the defense counsel asked the witness to read and state on the record whether or not she agreed with several written opinions propounded by the designated experts of the parties. *Id.* at 41-42. Each time this occurred, her counsel instructed her not to

answer the question, and a motion to compel ensued seeking to compel the witness to answer. Upon reviewing the briefs and the deposition transcript, the court held:

> The only questions the witness was directed not to answer were improper questions by Dianon's counsel that appear to have been designed to get an admitted expert in the field, not simply to express her own opinions, but instead either to bless or condemn the trial opinions rendered by the parties' experts, even though neither party had actually designated Dr. Stetler-Stevenson as an expert in this case, and Dianon had never sought to take her deposition as an expert under Rule 26(b)(4)(B) or Rule 45(c)(3)(B). The Court cannot conceive of a proper purpose for the particular questions posed by Dianon's counsel.
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> * * *
>
> But the questions posed to Dr. Stetler-Stevenson show that Dianon's counsel was not interested in her factual testimony about the way in which the NIH addresses the subjects covered by the parties' experts. Instead, Dianon's counsel baldly sought to use the guise of a Rule 30(b)(6) deposition to try to force a non-designated expert to embrace the trial opinions expressed by the parties' own designated experts. There is no warrant in the rules for such conduct.

Id. at 42-43 (notes omitted). Upon due consideration, the Court did not condone the decision to instruct the witness not to answer, but held that this error was harmless given the impropriety of Dianon's counsel's questions, and accordingly, it denied the motion to compel and sustained the NIH's motion for protective order. *Id.* at 43-44.

Dianon suggests a similar outcome to Plaintiffs' Motion here. Plaintiffs' conduct at Peterson's 30(b)(6) deposition was patently unfair, and amounted to nothing more than an ambush to see if they could coerce a lay witness for the defense to endorse some, if not all of their scientific fate and transport and causation arguments. Peterson's witness was present and prepared to give factual testimony on the Topics subject to its counsel's written objections set forth in advance of the deposition. When asked factual questions, Mr. Houtchins gave full answers as was his obligation. Peterson only refused to give

binding testimony when Plaintiffs' counsel strayed from the Notice far a field into complex legal and scientific matters, which as the *Dianon* court observed, were of "no proper purpose." Accordingly, Peterson respectfully suggests that the Court deny Plaintiffs' request for Peterson to provide testimony on these matters.

III. ANY REQUEST FOR SANCTIONS SHOULD BE DENIED

Plaintiffs have not set forth any specific argument or factual predicate that would support any award of sanctions against Peterson. Nonetheless, given that Plaintiffs made a generalized plea for relief under Fed R. Civ. P. 37, Peterson addresses the impropriety of any such award in the unlikely circumstance that the Court finds merit in any of Plaintiffs' arguments.

A. Plaintiffs Have Failed to Prove Prejudice in Support of A Claim for Sanctions

Plaintiffs' Motion and Mr. Houtchin's deposition testimony fail to demonstrate that Plaintiffs suffered any actual prejudice as a result of Peterson's refusal to answer their improper questions. Such a showing is required to support Plaintiffs' prayer for the Court to impose sanctions upon Peterson. *See Ehrenhaus v. Reynolds*, 965 F.2d 916, 921 (10th Cir. 1992); *Pinson v. Equifax Credit Information Serv.*, 2007 WL 690123 at *2 (N.D. Okla. Mar. 2, 2007)(citing the *Ehrenhaus* factors). Put into context, Plaintiffs have failed to show that the answers they failed to receive went to relevant, material or admissible matters.

As the foregoing discussions illuminate, the only areas of inquiry where Peterson refused to provide binding testimony related to purely legal conclusions and matters involving expert analysis. Even assuming that Peterson was required to answer theoretical and hypothetical scientific questions, the effort would be fruitless, because

neither Peterson nor any representative it could produce would be qualified to offer such opinions, rendering any such testimony inadmissible in this proceeding. Fed. R. Evid. 702. As aptly put by the district court in *Banks v. Office of the Senate Sergeant-At-Arms*, 241 F.R.D. 370 (D. D.C. 2007), with regard to that plaintiff's motion to compel 30(b)(6) testimony, the only prejudice suffered by Plaintiffs here as a result of Peterson's 30(b)(6) deposition was their "inability to secure irrelevant information that cannot serve as the basis for any aspect of [their] claims." *Id.* at 375.

B. Pursuant to the Elements of Fed. R. Civ. P. 37(a)(5), Plaintiffs Are Not Entitled to Fees and Costs

Plaintiffs are not entitled to an award of fees and costs associated with their Motion because they failed to confer informally with Peterson prior to filing the Motion as required by Fed. R. Civ. P. 37(a)(5)(A)(i), and because Peterson has made a sufficient showing of justification under Fed. R. Civ. P. 37(a)(5)(A)(ii).

Counsel for Peterson communicated with Plaintiffs' counsel advising him that Peterson viewed the Plaintiffs' decision to file the instant Motion without any effort to confer as a violation of Fed. R. Civ. P. 37(a)(5)(A)(i) and N.D.LCvR 37.1, and requesting that Plaintiffs withdraw the Motion until such time as the required conference was concluded. (*See* e-mail correspondence from S. McDaniel to D. Riggs, dated August 28, 2997, attached hereto as Ex. "C".) Plaintiffs' counsel responded expressing his view that the discussion on the record at Peterson's 30(b)(6) deposition would suffice, and that he would not withdraw the Motion. In all candor, Peterson stipulates that as to Plaintiffs' inquiries into areas involving statutory interpretation and expert matters subject to Fed. R. Evid. 702, an informal conference would have been fruitless. However, Plaintiffs Motion goes much further. Plaintiff asserts that Peterson failed to produce a witness that was

prepared to testify on a number of Topics. This alleged lack of preparedness was not the subject of discussion at the deposition, and therefore, Plaintiffs did not fulfill their duty under the federal and local rules to bring their concerns to Peterson before filing this Motion. Accordingly, Plaintiffs have failed to satisfy the requirement of Fed. R. Civ. P. 37(a)(5)(A)(i), which renders an award of fees and costs inappropriate.

The Court may also deny a successful movant its fees and costs if it finds that the party refusing to allow the discovery to be had was sufficiently justified. Fed. R. Civ. P. 37(a)(5)(A)(ii). Peterson's Response explains in great detail the impropriety of Plaintiffs' 30(b)(6) examination in two critical areas, as well as the fact that Peterson complied with its obligations under Fed. R. Civ. P. 30(b)(6). As the examples discussed above illustrate, the courts have found sufficient justification for denying discovery when the deposition examination reached improper subjects for a 30(b)(6) witness and would not have netted relevant and admissible testimony. *See e.g., Sprint Communications Co. v. Vonage Holdings Corp.*, 2007 WL 2333356 (D. Kan., Aug. 15, 2007). Accordingly, in the event the Court finds merit in any of Plaintiffs' arguments, Peterson respectively suggests that the Court should deny any request by Plaintiffs for sanctions or an award of fees and costs.

CONCLUSION

Plaintiffs' Motion is completely devoid of merit. In their attempt to paint Peterson as uncooperative, they allege that Peterson did not produce a knowledgeable witness on Topics that were assigned to a witness Plaintiffs failed to reserve time to examine, and avoid directing the Court to the transcript where they actually asked questions within the scope of their Topics and received full answers. Plaintiffs spend the

bulk of their brief in an attempt to paint Peterson's counsel as obstructive, but they ignore that the lines of inquiry at issue were outside of the express limit of their Notice, and were completely inappropriate for this lay 30(b)(6) witness. Peterson complied with its obligations and gave the factual information to which Plaintiffs were entitled. To the extent Plaintiffs attempted to use the deposition as a guise to solicit inadmissible legal and expert opinions to bolster their case, their tactics should be condemned. Hence, Peterson respectfully requests the Court deny Plaintiffs' Motion and sustain Peterson's Motion for Protective Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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